

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

77-6074

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTPORT TAXI SERVICES, INC., :
ET AL, :

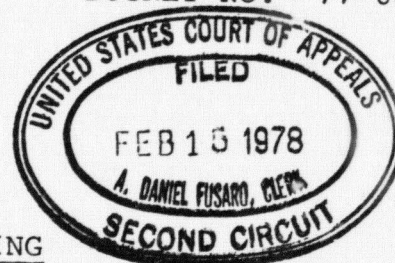
PETITIONERS-APPELLANTS :

V. :

DOCKET NO. 77-6074

BROCK ADAMS, SECRETARY OF :
TRANSPORTATION, ET AL, :

RESPONDENTS-APPELLEES :



PETITION FOR REHEARING

On January 24, 1977, this Court reversed the decision of the district court below as to the applicability of §1602d and §1602e of the Urban Mass Transportation Act, 49 U.S.C. §1601, et seq., to demonstration projects funded under the Act. The Court expressly overruled the district court's conclusion that the certification and finding requirements of these statutes do not apply to demonstration projects, holding, as appellants contended, that the congressional concerns underlying §1602d and §1602e apply with equal force to long-term and demonstration projects.

The Court declined, however, to afford appellants a claim for relief under §1602e, on the ground that appellant's taxi company, Westport Taxi Service, Inc., is not a "mass transportation company" and is thus not within the scope of the protections of that statute. Although recognizing that the statutory definition of "mass transportation" was explicitly broadened by Congress and would seem, on its face, to encompass the services provided by Westport Taxi, the Court rejected such a construction, relying heavily on a purported interpretation to the contrary by UMTA, as contained in an affidavit by UMTA official Charles F. Bingham submitted to the district court.

Appellants agree that this Court may properly look to agency interpretation to determine the definition of "mass transportation." Appellants, however, respectfully request the Court to reconsider its factual holding that Bingham's affidavit accurately presents UMTA's official position, in view of the fact that the affidavit, prepared specifically for this litigation, is directly contradicted by UMTA's prior explicit public policy statements on the subject.

UMTA's policy statement on paratransit services specifically recognizes that private taxi companies fall within the protections of §1602e:

PROTECTION OF EXISTING PRIVATE OPERATORS

Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the provision of paratransit services where such private operators are willing and able to provide this service. Pursuant to this policy and to Section 3(e) §1602e] and 4(a) [§1602a] of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the time mass transportation services).

See App. Ex. F at 152
[41 C.F.R. 46412, 46413]
(emphasis added).

Significantly, the language of this policy statement is plainly drawn from §1602e, inserting the phrase "existing local taxi operator" for the statutory phrase "mass transportation company."

The position expressed in UMTA's policy statement was reiterated in a letter of July 12, 1976 (prior to institution of this action) by Robert E. Patricelli, Administrator of UMTA, to Bill R. Stokes, Executive Director of the American Public Transit Association, in which Patricelli stated:

[S]pecifically, local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded a fair and timely opportunity to participate in the planning of community-level paratransit services and special services for elderly and handicapped persons developed pursuant to DOT Regulations for Transportation for Elderly and Handicapped Persons (49 CFR 613.204). Local private carriers must also be given an opportunity to recommend the inclusion of private paratransit services in the annual element of the Transportation Improvement Program.

....
Local Taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded full opportunity to bid for the provision of any general or special paratransit services proposed for implementation with the assistance of Federal Funds.

Patricelli specifically noted that compliance with this policy would be accomplished through the §1602 review procedures:

Compliance with the above policy will be ensured by UMTA through a review of the annual element of the Transportation Program, and of individual paratransit project applications for Section 3 [§1602] 5, and 16(b) grants.

See Appellees Appendix
at B-215, 216
(emphasis added).

The policy statement was also repeated verbatim in an article by C. Kenneth Orski, Associate Administrator for Policy and Program Development of UMTA, written for a taxi trade magazine, Taxicab Management, "UMTA's View of the Role of Taxicabs in Public Transportation," p. 12, 13 (November 1976) [Appellant's Appendix Ex. G at A-153].

James Bautz, head of UMTA's Paratransit Demonstrations Divisions and liason with the taxicab industry, has similarly made clear that

"...local taxi operators and other private carriers must be afforded a fair and timely opportunity to participate in the planning of community level and special transit service development of the local transportation plan. UMTA will not provide financial assistance to support public paratransit services in competition with similar private services unless honest efforts are made to involve private operators as providers of paratransit services."

Bautz, Taxicab Management,
"UMTA's Current Involvement
with the Taxicab Industry,"
p. 11, 13 (February 1977)
[App. Ex. H. at A-160].

Indeed, Bautz' article makes specific reference to numerous projects funded by UMTA apparently involving exclusive as well as shared-ride taxi service, in direct contradiction of Bingham's affidavit. Id., at p. 161 (i.e., purchase of 66 diesel taxis, funding of feeder service for exclusive ride).

These past public policy expressions by UMTA officials raise substantial factual issue as to the agency's own interpretation of §1602e.

The district court did not reach this factual question because of its resolution of the issues on grounds held erroneous by this Court. In the proceedings below, in response to the government's submission of Bingham's affidavit, the plaintiffs moved to depose Charles F. Bingham and James Bautz to establish UMTA policy and past practice in interpreting §1602e. The grounds, inter alia, cited by the government in its Motion to Quash was that the depositions were "unnecessary for a resolution of the issues of this case." The federal defendants moved for a protective order quashing the notice of deposition, and this motion was granted by the District Court on January 11, 1977. See Docket Entry No. 20, Appellant's App. Ex. A, A-1. Although the plaintiffs did not further pursue the court's denial of depositions after the hearing on January 11, 1977, it is apparent that the plaintiffs have been prejudiced by their inability to establish an adequate record for determination by this Court.

Under this Court's interpretation of the Act, the entire taxi industry of New York City which operates on an exclusive ride basis carrying thousands of passengers

a day as an integral part of the city's entire mass transportation system, would not be protected against federal competition. Thus, in light of the importance of this issue, not only to the Westport project involved herein but to the requirements for the extensive funding undertaken by UMTA throughout the country, appellants respectfully request that this Court not attempt to resolve this factual dispute at the appellate level without benefit of findings by the district court. Accordingly, appellants pray that this Court authorize the district court on remand to make a factual determination of UMTA's actual interpretation of §1602e, resolving any inconsistencies between UMTA's past policy and its position in this litigation.

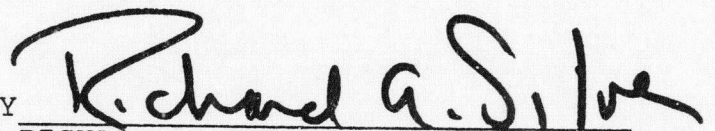
Such remand will not burden operations of the project. In its opinion, this Court enjoined federal funding of the project, pending compliance with the certification and funding requirements of §1602d. Although, in their brief to this Court, appellees contended that the required hearings had, in fact, been held, appellants have been informed by the federal defendant that "new" public hearings will be required to comply with this Court's ruling. In the time required for such hearings, an inquiry into UMTA's official interpretation of §1602e can be completed by the district court.

CONCLUSION

WHEREFORE, the Petitioners-Appellants pray that this matter be remanded to the district court for factual determination as to the interpretation that UMTA has given §1602e.

RESPECTFULLY SUBMITTED,
THE PETITIONERS-APPELLANTS,

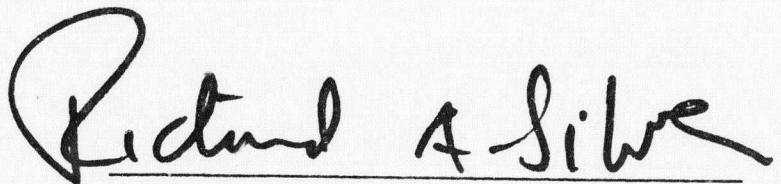
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CERTIFICATION

This is to certify that a copy of the foregoing has been sent to all counsel of record.



RICHARD A. SILVER

